Supreme Court, U.S.
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In the Supreme Court
of the
United States

October Term, 1987

Alimeg, Inc., an Oregon corporation,
Petitioners,

vs.

Sylvia Shlim
Respondent,

and

CML, Inc., an Oregon Corporation,
Defendant.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of Oregon

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The Petitioner Alimeg, Inc. respectfully prays that a writ of certiorari issue to review the judgement and opinion of the Oregon Court of Appeals and the order of the Supreme Court of the State of Oregon denying review thereof. [1]

QUESTION PRESENTED

Is a Landlord who has sought and obtained a preferential payment of rent under 11 U.S.C. § 503 estopped from enforcing a pre-existing forfeiture under state law?

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[1] The parties to this proceeding are: the Petitioner and lessee, Alimeg, Inc. (formerly Charapata, Inc.); the landlord, Sylvia Shlim, and the sublessee, CML, Inc. Both of the corporations are closely held family corporations which have no parent or subsidiary corporations. The principals of Alimeg, Inc. are Edward and Anne Charapata. The principal of CML, Inc. is Mabel Baughman. Sylvia Shlim's predecessor in interest was her husband, Nathan Shlim.

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The Petitioner Alimeg, Inc. respectfully prays that a writ of certiorari issue to review the judgement and opinion of the Oregon Court of Appeals and the order of the Supreme Court of the State of Oregon denying review thereof.

Opinion Below

The opinion of the Oregon Court of Appeals, reported at 87 Or. App. 178, 742 P.2d 54 (1987) appears in the appendix hereto.

Jurisdiction

The decision of the Oregon Court of Appeals was filed on September 2, 1987. A timely petition for review by the Oregon Supreme Court was denied on December 15, 1987. The judgement of the Court of appeals was entered on February 16, 1988. This petition is filed within 90 days of the denial of review by the Oregon Supreme Court. Jurisdiction of this Court lies under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Is a Landlord who has sought and obtained a preferential payment of rent under 11 U.S.C. § 503 estopped from enforcing a pre-existing forfeititure under state law?

FEDERAL STATUTORY PROVISIONS

This petition involves the interpretation and application of 11 U.S.C. §503(b) and 11 U.S.C. § 365(d)(4).

STATEMENT OF FACTS

The appellant, Alimeg, Inc., is the lessee and sublessor of certain real property owned by the respondent and located at 1687 Summer Street, N.E., Salem, Oregon. CML, Inc. is the sublessee of the same property. The present use of the property is as a long-term care facility, a nursing home, licensed by the Oregon State Health Division.

From the commencement of the lease until 1980, the license was held by Alimeg, Inc. Since 1980, the nursing home license has been held exclusively by CML, Inc. The facility is licensed to care for, and is populated by, forty-six (46) elderly

persons.[2] In 1982, an action was filed against Alimeg, Inc. by the Sylvia Shlim (hereafter "the landlord") in the Circuit Court of Clackamas County regarding a disputed settlement agreement entered into in December of 1981. That action came to trial in June of 1984 when the Court held that the landlord's version of the settlement agreement was enforceable. The effect of this judgment was to increase the rent from $2,550 per month to $3,600 per month.

Following the entry of judgment in the Clackamas County action in July 1984, Mrs. Shlim continued to accept rent, up to and through November 1984, at the old rate of $2,550 per month. On December 7, 1984, the plaintiff returned the December rent check with a letter declaring a default and demanding payment of the $3,600 rental amount within seven days. That letter states:

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[2] There has never been any allegation by any party that the quality of care rendered to these patients by the appellants was other than of the highest quality.

"...The court has held after lengthy litigation that the rental due on the lease was modified by agreement of the parties to the sum of $3,600 per month. In addition, the lease requires that the lessee submit with each month's rental payment a pro rata portion of the real property taxes which will next become due. Real Property taxes for 1984-85 were $12,524, and since tases have gone up each year, we can assume that the 1985-86 taxes will be at least $12,500. Accordingly, each monthly payment should include the sum of $1,041.66 as a pro rata protion of the taxes due.

We are returning the check in the amount of $2,550 which has been received this date apparently for the December rental payment, as it is not the full amount which is due. If this default is not cured within seven days of the date of this correspondence by the payment of the sum of $3,600 as and for the December rental payment, we will institute an action for Forceable Entry and Detainer..."

On January 10, 1986, the landlord filed the instant action. Subsequent to the filing of the action, on January 15, 1985, the landlord sent

another letter to appellant Alimeg, Inc. That letter states:

> ".....This will serve as written notice that the lease dated September 2, 1971 between Nathan Shlim, "Lessor", and Charapata, Inc., "Lessee", is hereby terminated for nonpayment of rent and failure to pay real property taxes. Reference is made to my correspondence of December 7, 1984, which is incorporated by reference herein as though fully set forth."

On January 30, 1985, Alimeg, Inc. filed for protection under Chapter 11 of Title 11 of the United States Code, and the F.E.D. proceedings were temporarily stayed by the effect of 11 U.S.C. S 362. The plaintiff sought and obtained relief from the stay of proceedings imposed by 11 U.S.C. S 362. The order granting relief from stay was signed on March 18, 1985. The Debtor timely filed a motion for the assumption of the lease pursuant to 11 U.S.C. S 365(d)(4).

After seeking and obtaining relief from stay, and before the F.E.D. proceeding was rescheduled for trial, the landlord obtained an order for the payment of rent for the premises from the Bankruptcy Court. The landlord stipulated, in that order, that the rent amount established by the Clackamas County judgement was the rent for the property. The stipulation also included payment by the Debtor of a pro rata share of property taxes. It was stipulated that the rent was to be applied to the months of February, March and April, 1985, the first three months after the landlord claimed the lease was terminated.

After the landlord obtained rent through the Bankruptcy Court, the plaintiff reset the trial of the F.E.D. action based upon the pre-bankruptcy termination letter. The action was tried before the Honorable Thomas Beck in Marion County District Court on August 23, 1985.

At the trial, the trial court refused to consider the landlord's application for and obtaining of

administrative rent from the bankruptcy court as a basis for a claim of estoppel. The trial court granted a judgment of eviction.

The issue of the effect of the administrative rent was also timely raised on appeal as the first assignment of error in the petitioner's opening brief:

> "Did the plaintiff's application for (a) stipulation to the receipt of rent for February, March and April of 1985 constitute a waiver of the forfeiture of the lease?"

REASONS FOR GRANTING THE WRIT

The issue here appears plainly from the factual premises which are set forth above and which are outlined in the opinion of the Court of Appeals.

The landlord in this action sent a notice of forfeiture based upon a claimed default in rent.

Thereafter, in the federal bankruptcy proceedings, the landlord sought and obtained a preferential payment over the other creditors of the

debtor Alimeg, Inc. on the basis that she was receiving "rent" for the premises.[3] She was successful and received rent for three months after the termination of the lease. It is unquestioned that the landlord received nearly fourteen thousand dollars from her efforts.

After receiving that rent, the landlord then proceeded to reset her FED action for trial and to proceed to judgement on the ground that the lease was terminated prior to the filing of the petition under Title 11.

Under Oregon law, ORS 91.090 provides in part:

> (1)If the landlord, after (a) default in payment of rent, accepts payment thereof, the lease is reinstated for the full period fixed by its terms, . . .

See *Reeves v. Baker,* 279 Or. 417 (1974); *Kruse v. Blair et al,* 127 Or. 393, 272, P. 265 (1928);

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[3] This stipulation is included inthe appendix to this petition for the convenience of the Court.

and *Falk v. Armsberg* 279 Or. 417, 596 P.2d 558 (1977).

In a situation such as this one, the landlord is estopped from urging any distinction between rent periods. The landlord sought and received a payment of rent in preference to the other creditors of the estate. She had already obtained relief from the automatic stay imposed under 11 U.S.C. § 362 so that she could proceed at will with her FED action . Yet, before so proceeding, she sought and obtained the payment of "rent" for three administrative months.

The only basis for the finding that this was an "actual" or "necessary " cost of preserving the estate is based upon the preservation of the leasehold under 11 U.S.C. 503(b)(1)(A).

Since this proceeding was filed in 1985, it is governed by 11 U.S.C. §365(d)(4) as amended in 1984. Under that subsection, the lease was automatically rejected unless it was assumed by

March 29, 1985 (the sixtieth day after filing). Since the plaintiff sought and obtained relief from stay, it is unlikely that an assumption could take place. This is a further reason why the payment of rent did not constitute an action to "preserve" the estate under 11 U.S.C. §503(b)(1)(A).

The question presented directly here is whether the landlord may seek preferential payments under 11 U.S.C. §503(b) and then deny the lease under which those payments were sought.

This interrelationship of state of waiver/estoppel and the rights of a debtor/lessee is a source of continuing friction following the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, through which 11 U.S.C. §365(d)(4) was amended into its present form. Compare *In Re Dulan*, 52 B.R. 739, 742-743 (Bkrtcy, C.D. Cal. 1985), *In Re By-Rite Distributing, Inc.* 47 B.R. 660, 670 (Bkrtcy. Utah 1985) and *In Re Independence Village*, 52 B.R. 715, 721-722 (Bkrtcy. E.D. Mich. (1985).

This interrelationship has been the source of endless litigation within the three years since the passage of the 1984 amendments. This case presents the Court with an opportunity to confirm that the doctrines of waiver and estoppel established in state law are not vitiated by the filing for protection of a petition under Title 11.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgement and opinion of the Oregon Court of Appeals.

DATED this 14th day of March, 1988.

ORRIN LEIGH GROVER
Attorney for Petitioner
Alimeg, Inc.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OREGON

SHLIM, SYLVIA,	)	
	)	
Respondent,	)	ORDER DENYING REVIEW
	)	
v.	)	CA A38151
	)	SC S34597
ALIMEG, INC.,	)	
	)	
Petitioner.	)	
	)	
CML, INC.	)	
ALIMEG, INC.	)	
CML, INC.	)	

The Court has considered the petition for review and ORDERS that it be denied.

DATE: DECEMBER 15, 1987.

/s/EDWIN PETERSON
Chief Justice

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

SHLIM, SYLVIA,	)	
	)	
Respondent,	)	DECISION
	)	
v.	)	No. A38151
	)	
ALIMEG, INC.,	)	
	)	
Petitioner.	)	
	)	
CML, INC.	)	
ALIMEG, INC.	)	
CML, INC.	)	

NEWMAN, J.

Defendants Alimeg, Inc. (lessee) and CML, Inc. (sublessee) appeal a judgment for plaintiff (lessor) in this forcible entry and detainer action. We affirm.

In September 1971, lessee leased premises for use as a nursing home from lessor under a written lease agreement. The monthly rental was $2,550.

In April, 1981, lessee sublet the premises to sublessee. Lessor and lessee had modified the lease to increase the monthly rental to $3, 600. Lessor, however, continued to accept rent of $2,550 through November, 1984. On December 7, 1984, lessor returned the December rent check to lessee with a letter that stated:

> "The court has held after lengthy litigation that the rental due on the lease was modified by agreement of the parties to the sum of $3,600 per month. In addition, the lease requires that the lessee submit with each month's rental payment a pro rata portion of the real property taxes which will next become due. Real property taxes for 1984-85 were $12,524, and since taxes have gone up each year, we can assume that the 1985-86 taxes will be at least $12,500. Accordingly, each monthly payment should include the sum of $1,041.66 as a pro rata portion of the taxes due.
>
> "We are returning the check in the amount of $2,550 which has been received this date apparently for the December rental payment, as it is not the full amount which is due. If this default is not cured within seven days of the date of this correspondence by the payment of the sum of $3,600 as and for the December rental payment, we will institute an

action for Forceable Entry and Detainer."

Lessee failed to pay rent or pro rata property taxes for the months of December, 1984, and January, 1985. On January 10, 1985, lessor commenced this action.

On January 15, 1985, lessor sent this notice to lessee:

"Gentlemen:

> This will serve as written notice that the lease dated September 2, 1971 * * * *is hereby terminated for nonpayment of rent and failure to pay real property taxes. Reference is made to my correspondence of December 7, 1984, which is incorporated by reference herein as though fully set forth."

On January 30, 1985, lessee filed a petition in bankruptcy. The FED action was temporarily stayed. 11 USC Section 362. In May, 1985, the bankruptcy court entered a stipulated order:

> "The Debtor [lessee] has made a motion for the payment of certain administrative expenses. The motion came on specially for hearing on May 6, 1985. After consultation

between the interested parties, it is agreed as follows:

"1. That the payment of administrative rent in the amount of $3,600 per month for February, March and April, 1985 shall be authorized.

"2. That the payment of the pro rata portion of the real property taxes for the months of February through April, 1985 in the aggregate amount of $3,150.00 is approved."

Defendants argue that lessor's acceptance of the administrative rent effected a reinstatement of the lease. ORS 91.090 provides, in part:

> "[I]f the landlord, after [a] default in payment ment of rent, accepts payment thereof, the lease is reinstated for the full period fixed by its terms, subject to termination by subsequent defaults in payment of rent."

In Reeves v. Baker, 270 Or 837, 530 P2d 30 (1974), the tenants tendered into the court the rent due plus interest while the landlords' FED action was pending. On the landlords' motion, the trial court disbursed the tendered rent to them during pendancy of the tenants' appeal. The court stated:

> "[W]hen the plaintiffs after default in payment of the rent accept payment of the rent upon which their action is predicated, the lessee was 'reinstated' subject to termination of subsequent defaults in payment of rent." 270 Or at 840. (Emphasis supplied.)

Here, the rent upon which lessor predicates her action was for December, 1984, and January, 1985. Lessor accepted administrative rent for February, March and April, 1985, but that did not waive lessee's default in payment or reinstate the lease under ORS 91.090. See also Kruse v. Blair, et al, 127 Or 393, 397, 272 P. 265 (1928).

Defendants next argue that lessor's notices of default and termination were inadequate. They assert that the letter of December 7, 1984, was a premature notice of default, because they had a 10-day grace period after December 1, 1984, which had not yet expired. They also assert that the notice of termination of January 15, 1985, was too late, because plaintiff had already commenced the FED action. The lease provides:

"16. Default. The following shall be events

of default:

16.1 Default in Rent. Failure of Lessee to pay any rent or other charge within ten (10) days after it is due.

16.2 Default in Other Covenants. Failure of Lessee to comply with any term or condition or fulfill any obligation of the lease (other than the payment of rent or other charges) within ten (10) days after written notice by Owner specifying the nature or the default with reasonable particularity. If the default is of such a nature that it cannot be completely remedied within the ten days, this requirement shall be satisfied if Lessee begins correction of the default within the ten day period and thereafter proceeds with reasonable diligence and in good faith to effect the remedy as soon as practicable.

"* * * * *

"17. Remedies on Default.

17.1 Termination. In the event of a default the lease may be terminated at the option of Owner by notice in writing to Lessee. Such notice may be included in a notice of failure of compliance given under Section 16.2 in which event the notice shall be effective if the default is not cured within the grace period."

It is of no consequence that the letter of December 7, 1984, was sent before the 10-day grace period in section 16.1 had expired. That section does not require a written notice of default. Moreover, there is no statutory requirement for such notice. See ORS 91.090. Section 17.1, however, does require a written notice of termination. The December 7, 1984, letter was sufficient to comply with section 17.1. It contained notice of lessor's intent to institute an FED action if the rent was not paid within the time period specified, which was equivalent to notice of her intent to terminate the lease. See Burman v. Garon Development Corp., 70 Or App 665, 690 P2d 1090 (1984), rev dismissed (1985). Accordingly, it does not matter that the January 15, 1985, notice was sent after lessor had commenced the FED action.

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....

....

Lessee's argument that the district court should have declined to exercise jursidiction, because the premises are used as a nursing home, is without merit.

Affirmed.

Filed: September 2, 1987

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN THE MATTER OF	)	NO. 385-00303S 11
	)	
ALIMEG, INC.,	)	STIPULATION AND
	)	ORDER
Debtor.	)	
	)	

The Debtor has made a motion for the payment of certain administrative expenses. That motion came on specially for hearing on May 6, 1985. After consultation between the interested parties, it is agreed as follows:

1. That the payment of administrative rent in the amount of $3,600 per month for February, March and April, 1985 shall be authorized.

2. That the payment of the pro rata portion of the real property taxes for the months of February through April, 1985 in the aggregate amount of $3150.00 is approved.

3. That the payment of post-petition attorneys fees in the amount of $2,000.00 is approved.

4. That the payment of $2,050.00 to the Internal Revenue Service is also approved. This is a payment on their secured lien.

Date: May 8, 1985 /s/ Orrin Leigh Grover
Attorney for Debtor

Date: May 8, 1985 /s/ John H. Heald
Attorney for Creditor Shlim

Date: May 8, 1985 /s/----Gilford for the
Internal Revenue Service

IT IS ORDERED THAT the foregoing stipulation is approved and payment is authorized.

Date: May 8, 1985 /s/ Donal D. Sullivan
U.S. Bankruptcy Court Judge

Filed in the Bankruptcy Court: May 8, 1985.